JD(ATL)—46—03
Miami, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PUBLIX SUPERR MARKETS, INC.

and	**CASES**	**12–CA–21393-3**
		12–CA–21393-4
		12–CA–21495-7
		12–CA–21553-3
		12–CA–21958
UNITED FOOD & COMMERCIAL		**12–CA–22174**
WORKERS INTERNATIONAL UNION		**12–CA–22277-2**
AFL-CIO/CLC		**12–CA–22277-3**
and	**CASES**	**12–CA–20429**
		12–CA–22059
UNITED FOOD & COMMERCIAL		
WORKERS LOCAL 1625, AFL-CIO/CLC		
and	**CASE**	**12–CA–221172-1**
TARVIS HOOKS, An Individual		
and	**CASE**	**12–CA–221172-2**
JOAQUIN GARCIA, An Individual		
and	**CASE**	**12–CA–21228**
EDGAR LINARTE, An Individual		
PUBLIX SUPERR MARKETS, INC.		
and	**CASE**	**12–RC–8716**
UNITED FOOD & COMMERCIAL		
WORKERS LOCAL 1625, AFL-CIO/CLC		

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This consolidated case was heard before me on nine separate days between March 10, 3003 and March 27, 2003, in Miami, Florida. The complaint as amended at the hearing was issued by the Regional Director of Region 12 of the National Labor Relations Board ("the Board") based on charges brought by United Food & Commercial Workers, International Union, AFL-CIO/CLC ("the Charging Party" or "the Union") and Tarvis Hooks, an individual and Joaquin Garcia, an individual and Edgar Linarte, an individual and alleges that Publix Super Markets, Inc. ("the Respondent" or "the Company") has engaged in and is engaging in violations of Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act"). The Respondent has by its answer, as amended at the hearing, denied the commission of any violations of the Act.

On the entire record, including testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

The complaint alleges, Respondent admits and I find that at all times material herein during the 12-month period preceding the filing of the complaint, Respondent has

been a Florida corporation, with an office and place of business located in Miami, Florida, where it has been engaged in the operation of a warehouse and distribution center for the distribution of groceries to its retail stores, Respondent in conducting its business operations derived gross revenues in excess of $500,000 and purchased and received at its facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida and at all material times Respondent has been an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material herein the International Union has been a labor organization within the meaning of Section 2(2), (6) and (7) of the Act.

III. Statement of Facts

A. Introduction and Background

The following is largely undisputed and is set out in the General Counsel's brief and is supported by the record in this case:

These cases[1] involve Respondent's alleged violations of Section 8(a)(1) and (3) of the Act. They occurred as part of Respondent's response to the organizing efforts of employees on behalf of the United Food and Commercial Workers Union, Local 1623, AFL-CIO, CLC ("the Union"). The 8(a)(1) conduct extends from 1999 to 2002 and was alleged to have been committed by numerous supervisors and department heads and to have taken place both in large meetings and in one-on-one conversations with employees. The 8(a)(1) allegations run the gamut from threats of plant closure, loss of jobs and benefits to denying employees a witness in a meeting that could have lead to discipline under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000). The 8(a)(3) allegations involve various forms of discipline, including the suspension and discharge, of well-known and long-time union adherent Luis Pacheco by Respondent.

Respondent[2] operates a full service dry grocery warehouse and distribution center in Miami, Florida for Publix Supermarkets. It is part of Publix Super Markets that operates a grocery chain in Florida and other states that the Union has been attempting to organize for many years.

---

1 The United Food and Commercial Workers International Union, AFL-CIO, CLC and UFCW Local 1625, and individuals Tarvis Hooks, Joaquin Garcia, and Edgar Linarte filed the charges in these cases, the first being filed October 18, 1999, by the International and the last amended charge being filed on September 18, 2002 also by the International. Following the issuance of the Consolidated Complaint on October 31, 2002, Respondent filed a timely answer denying the essential allegations in the Consolidated Complaint. Another Order Consolidating Cases for Hearing and Notice of Hearing to add the objections in Case 12–RC–8716 was issued on December 12, 1992. The Region issued an Order Severing Cases, Approving Withdrawal of Petitioner's Obections to Election and Certification of Results of Election on March 7, 2002. The trial in this matter was held on March 10-14, 24-27, 2003, in Miami, Florida. At trial, the complaint was amended on the record to correct titles of supervisors and dates of certain 8(a)(1) allegations in complaint. Respondent amended its answer accordingly.

2 Respondent amended its answer at trial to change the name of Respondent to Publix Supermarket, Inc. Miami Distribution Center, Inc.

The Miami warehouse is a 69-door facility and employs about four hundred employees, referred to as associates, overall in the warehouse. There are two shifts in the warehouse department. Respondent's operations include a grocery department, a cafeteria, in-house maintenance, a garage, facility services, dispatch, and a recycle department.

Jack Mosko is the distribution manager at the Miami facility and is responsible for the whole warehouse operation. Richard Schuler held the position of distribution manager from 1995 to mid-2000. Schuler is now Vice President of Distribution and his office is in Respondent's corporate office located in Lakeland, Florida. Joe Cox, the warehouse superintendent of grocery, reports directly to Mosko. Cox is in charge of the grocery department, the day and night shift, receiving, shipping, inventory, the cafeteria, and sanitation.

Desmond Tice is the dayshift department head and he is in charge of receiving, shipping, sanitation, and pest control. Joue Cardona is the night shift department head and Keith Hankerson is the assistant department head on the night shift. Tice and Cardona report directly to Cox.

The line supervisors reporting to Tice on the day shift for shipping and receiving are Alvin Pratt, Keith Thomas, and Wendell Braye. Pratt supervises the dayshift forklift operators and warehousemen. Thomas supervises the dayshift selectors and order

checkers. Braye supervises the sanitation and pest control and fills in for Thomas and Pratt when they are out.

The line supervisors on the nightshift are Kathy McColgin, John Pinho, Mike Collins, and Caven Morgan, Joe Dineen, and James Royer, and although no longer employed, at one time, Luis Funes. The six first line supervisors report to Keith Hankerson, assistant department head and everybody on that shift reports to Cardona. In addition, Cardona has the direct responsibility for clerks and jockeys. Similarly, Hankerson has direct responsibility for inventory. The line supervisors each have responsibilities for teams consisting of forklift operators, sanitation, and selectors.

Sanitation has twenty-eight employees. Sanitation workers are responsible for making sure that it is a safe environment for the selectors and motor operators. Sanitation associates pick up damaged merchandise, sweep out the aisles, and make sure that there is no debris on the floor.

Repack is an extension of sanitation. Sanitation generally repacks the cases of damaged merchandise that is found in the warehouse and ships it out to the store or takes it back to Respondent's reclamation center. Repack is located in the southwest corner of the warehouse. There are two designated employees who are generally assigned to work on repack, but other sanitation employees also work it.

Mike Fitzpatrick is currently the Dispatcher Superintendent. In June-August, 1999, he was the Nightshift Department Head in charge of the shipping operation on the nightshift. Joe Dineen, a front line supervisor on the nightshift, was a dispatcher on the night shift between September 2001 and September 2002.

Respondent offers a 401(k), a retirement plan, a profit sharing plan, a cafeteria where employees are provided a free lunch, and provides employees with a Christmas or Holiday Bonus, which can be as much as two weeks of full wages.

Respondent has an ongoing educational program training for managers and supervisors referred to as "Union-Avoidance" training. The training does not end following a Union campaign.

Since 1993, the Union was involved in discrimination lawsuits that resulted in large settlements involving Respondent. The lawsuits received publicity and the Union used the publicity in its ongoing campaign to organize Respondent's employees. The Union has been attempting to organize Respondent's production and maintenance employees at the warehouse since late 1995, with an ongoing campaign of varying levels of intensity. The Union's International Representative Steven Marrs testified that former employee Mario Eaton began an in-house group called the Publix Union Brigade to address problems concerning workplace rules, wages, work schedules, and some of the managers. Marrs himself is a former Company employee who resigned in and was later recruited by the Union to work as an organizer and subsequently worked on the

Union's efforts to organize the Company. The Publix Union Brigade drew up a petition demanding changes in the workplace rules and faxed it to Respondent.

In 1995, Eaton contacted Union representative Marrs and they met in 1996. In 1996, they began to build a small committee. Mario Eaton, Domingo McCoy and Luis Pacheco were the main employees involved. In 1996, the interest in organizing came from mostly Hispanic associates because Hispanic employees perceived that African-Americans were getting better jobs and more promotions than Hispanics because of a prior race discrimination lawsuit. The committee handbilled the Miami warehouse a few times, about every two weeks, did some home calling and were getting authorization cards signed. Marrs and International representative Bob Andrews worked on the campaign.

Marrs testified that after a few weeks, Eaton had a change in attitude and became hard to contact. In May 1998, Respondent discharged Eaton. The Union filed an unfair labor practice charge on his behalf. The Region issued a complaint and the hearing opened on September 8, 1998. Prior to the close of the trial, the parties reached a settlement. The settlement renewed interest from Miami employees in trying to organize. Luis Pacheco and Domingo McCoy contacted Marrs asking him to meet with them and talk to them about starting another organizing campaign at Publix Supermarkets, Miami Distribution Center. Marrs began to build a campaign. The group of employees interested in organizing expanded from McCoy and Pacheco to include Tarvis Hooks,

Miguel Marin, Felix Berrios and Nay Keagler, and Joaquin Garcia. They began handbilling, home calling, and talking to employees.

The Union filed its first petition, on July 21, 1999. A hearing on the petition was conducted on August 4, 1999. The Union sent a letter dated August 8, 1999 to Richard Schuler identifying committee members. Pacheco hand delivered the letter to Richard Schuler. The letter identified Pancheco, McCoy, Berrios, Hooks, Keagler, Marin, and Garcia as members of the Union's organizing committee. The Union campaign consisted of home calling, weekly Union meetings, and handbilling. The Union translated some of the handbills in Spanish. Anti-union employees were also handbilling against the Union, but on different days of the week.

The election in Case 12-RC-8379 was set for September 30 and October 1, 1999. However, the Union withdrew its petition. Marrs testified that the committee found employees harder and harder to contact in home calling. Committee members were telling the Union representative that the employees were scared and there had been threats made about the warehouse closing if the Union came in. Marrs testified that he also heard from employees that the Respondent's supervisors were telling them not only would the warehouse be closed, but also that the workers were going to lose their jobs, and that the company would not negotiate with the Union. Marrs heard from the employees that the supervisors made these statements in meetings and one-on-one conversations.

After 3 months, Pacheco and McCoy called Marrs again. They felt that the promises that Respondent made to employees during the campaign had not been kept. Respondent was supposed to take a look at the wages, the so-called productivity average that they had maintained, and the attendance policy. When it did not happen, they called the Union to try again. They told Marrs the Respondent was starting to change all the rules again.

Marrs and his group of employee organizers started building a committee again. They began getting cards signed and home calling card signers. They tried to keep it underground as long as possible. Pacheco home called three days per week, Hooks home called about 5 days per week. Miguel Marin, Jefferson Jules, Joaquin Garcia, and McCoy, home called sporadically. There were other Union representatives helping Marrs going on home calls. They also handbilled to inform employees that they had a right to a witness when they had to talk to their supervisor about a matter that could lead to discipline.

Marrs filed some EEOC charges for some for the Hispanic employees and a religious discrimination charge for Jefferson Jules. The Right to Sue Letters relating to the EEOC charges were issued in about July and August 2000. A class action race discrimination lawsuit was filed against Respondent by employees on October 23, 2000. The named plaintiffs in that case were Garcia, Berrios, Pacheco, McCoy, Marin, and Lazarus Heredia.

During 2001, including March – April, the campaign continued to consist of home calling, conducting Union meetings, handbilling, and talking to workers about the Union. Pacheco, Hooks, Garcia, Marin, McCoy, and Jules continued to be active in the organizing efforts. On October 12, 2001, the Union filed another petition, Case 12-RC-8616, to represent Respondent's employees at this location. The DD&E issued dated December 7, 2001. After the petition was filed, the Union continued to home call, hold Union meetings and continued to get names of employees from the committee. They met with employees at their homes, a hotel, or neutral places. On January 3 and 4, 2002, an election was held and the employees decided against union representation. The Union filed objections to the election which were withdrawn prior to the hearing.

B. Section 8(a)(1) allegations

1. Paragraph 5(a) of the Consolidated Complaint alleges that in late June, July and early August, Supervisors Joe Cox and Mike Fitzpatrick disparately applied Respondent's no-solicitation/no-distribution rule.

General Counsel concedes that the rule is not unlawful but contends that it was discriminatorily applied to the posting of Union materials.

The rule is as follows:

SOLICITATION BY ASSOCITES

> Publix respects the right of all associates to our individual beliefs, opinions, memberships and associations. We respect and encourage the sharing of ideas and opinions among fellow associates. As long as we

> abide by the Rules of Unacceptable conduct (see especially No. 18, neglect of work responsibilities) we may share opinions, seek support for organizations which we support or in which we are members, discuss social or job-related issues, and engage in similar activities with fellow associates at any time.
>
> We must insist, however, that any such communications not disturb or interfere with the shopping experience of our customers in any way. (For example, we should never carry on a personal conversation with another associate in the presence of a customer in the store.)
>
> We must also prohibit any solicitations for commercial purposes (e.g. sale of magazines, life insurance, or merchandise) on company premises.
>
> Finally, we must prohibit the distribution of literature at any time for any purpose in working areas of the facility

It is undisputed that Respondent permitted employees to post material for the sale of automobiles, boats and other items. Bulletin boards are located in the garage, cafeteria, maintenance locker room, front docks, by the shipping and receiving offices and in the dispatch office. Material was also posted on the glass window of the shipping office.

Alleged discriminatee Luis Pacheco testified that he checked the bulletin board by the time clocks daily and saw items for sale of homes, cars and rims posted on the bulletin board. He observed that in 1999 pro Union material was posted but would disappear. On one occasion Pachecho posted Union material next to antiunion literature. On one occasion in August 1999, Pachecho saw Warehouse Superintendent Joe Cox tear Union material down from the glass window of the shipping office. Pachecho testified also that he observed other employees post antiunion material on the bulletin board but that only the Union material was removed.

Former employee Domingo McCoy testified that in July to August 1999, he observed employees posting notices of items for sale on the bulletin boards. Current employee Joaquin Garcia testified that he observed then Nightshift Department Head Mike Fitzpatrick remove old antiunion literature and put up new antiunion literature. He observed that the Union materials would disappear from the bulletin boards. Richard Schuler the former distribution manager for the Miami warehouse from 1995 to mid-2000, admitted that he told supervisors to remove Union literature from the bulletin boards and that the supervisors complied with these orders. Current Dispatcher Superintendent Fitzpatrick testified that he removed Union material from the bulletin board outside the selector's office that is used for production information and not for communications. The General Counsel contends that the evidence establishes that Respondent allowed other non-work related solicitation that did not involve the Union to be posted on company bulletin boards. However, the supervisors openly removed Union material from bulletin boards, thus conveying the message that the Union postings would not be allowed. She notes that the no-solicitation/no-distribution rule does not say that only company-oriented information is permitted on the bulletin boards. She contends that the refusal to permit the posting of pro-Union material by Respondent was violative of Section 8(a)(1) of the Act citing *Heartland of Lansing Nursing Home,* 307 NLRB 152, 160 (1992).

Respondent contends that consistent with the Solicitation policy, it removed both union and anti-union material from the bulletin boards. It contends that it is significant

that not one of the three witnesses (Garcia, McCoy and Pachecho) testified that any of the antiunion materials placed on the bulletin board were placed there by any of the antiunion employees. He notes that the only testimony shows that it was management and not employees who placed the antiunion materials on the bulletin boards. Respondent concludes that the General Counsel did not, therefore, prove a factual case of disparate treatment. Respondent contends that the legal question presented is whether an employer can post antiunion literature through its managers on a company-owned bulletin board while excluding employees from placing pro-union literature on the same company-owned bulletin board, citing *Hale Nani Rehabilitation*, 326 NLRB 335, 336 (1998) where the Board held that an employer's valid rule against employee distribution is not rendered unlawful because the employer chooses to use its own premises to engage in its own distribution.

I find that Respondent violated Section 8(a)(1) of the Act by its disparate enforcement of the no-distribution rule against pro-Union postings while permitting postings for the sale of various items such as automobiles, dinner tickets and the like. *Heartland of Lansing Nursing Home*, supra; *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); *Bon Marche*, 308 NLRB 184, 185 (1992). The *Hale Nani Rehabilitation* case, supra cited by Respondent dealt with a different issue which was the alleged disparate treatment by the employer which posted its own antiunion literature while not permitting the posting of pro-union literature. I accordingly do not find it dispositive of the issue in the instant case.

2. Paragraph 5(b) of the Consolidated Complaint alleges that on/or about late July or early August 1999, Respondent by its supervisor Alvin Pratt at Respondent's facility threatened employees with plant closure if they selected the Union as their bargaining representative.

Domingo McCoy, a former forklift operator on the night shift testified he heard Pratt talking to about seven or eight employees sometime after the petition was filed in 1999. McCoy testified he (McCoy) had been giving out union authorization cards to some new employees. McCoy placed the conversation at between 12:30 and 1:00 p.m. prior to the start of the night shift. He testified that employees Garcia, Bessios, and Perry were some of the employees in the group. McCoy testified that Pratt said that the group should

> be careful how we voted and to make the right decisions because they would start shipping work out of the warehouse to nearby warehouses until we didn't have enough work to . . . justify our plant to be open. That we wouldn't have enough work to be open because they would start shipping out our work out of the warehouse.

Current employee Garcia testified that in late July or early August 1999, he heard Pratt talking to a group of selectors and motor operators and tell them, "if your union came in, probably we close the warehouse."

Pratt was not called to testify and his absence was unexplained. Accordingly the testimony of McCoy and Garcia on this matter stands unrebutted on the record. Respondent defends against this allegation by attacking the credibility of McCoy's and Garcia's testimony and citing purported inconsistencies in the testimony of these two witnesses. He notes that on cross-examination, McCoy testified that he remembered

employees asking Pratt questions during this conversation but could not recall the subject matter of those questions. He also notes that at the hearing McCoy named "several" (three) of the employees present at the conversation but in his May 19, 2000 affidavit, McCoy stated he could not remember who was present. Respondent contends that Garcia's testimony is likewise incredible as Garcia testified he saw Pratt talking to a group of employees including McCoy and heard Pratt threatening to close the facility as he approached and that no one asked a question and the employees all left. Respondent notes also that Garcia testified that supervisors did not want to talk about the Union in front of him and McCoy on that date. Respondent also contends that it is highly unlikely that Pratt, after receiving training from highly qualified trainers by Labor Relations Manager Mark Codd and Labor Relations Specialist Curtis Palmore, would have told associates that the Company would close the facility if the union is elected.

I find based on the unrebutted testimony of McCoy and Garcia, a current employee, that supervisor Pratt did tell the employees that the warehouse would be closed or the work would be removed if the Union were selected by the employees as their collective bargaining representative. Although I note some inconsistencies in the testimony of these employees, I credit their testimony that Pratt was threatening plant closure and/or the removal of work as a consequence if the Union were selected. I do not find that their testimony is rebutted or diminished in the weight to be accorded it as a consequence of any training in labor relations that may have been administered. I find rather that it is more likely that Pratt was passing on this threat to employees which he had in some fashion been apprised of by management.

I find that Respondent violated Section 8(a)(1) of the Act by the threat of plant closure made to employees by Pratt. *Springs Industries*, 332 NLRB 40 (2000); *Dlubak Corp.*, 307 NLRB 1138, 1143, 1152 (1992); *Electrical South Inc.*, 327 NLRB 270 (1998)

3. Paragraph 5(c) of the Consolidated Complaint alleges that in/or about late July and in/or about September or October 1999, Respondent by Desmond Tice, Respondent's Dayshift Department Head threatened to deny employees employment opportunities if they selected the Union as their bargaining representative.

This allegation involves alleged threats by Tice to employees that if the Union were selected, the employees would no longer be permitted to become truck drivers as the petitioned for unit does not include truck drivers. Entry-level positions in the warehouse are sanitation employees and selectors. Selectors then move into forklift positions. Employees also usually move from nightshift to dayshift. Truck driver positions are considered very desirable by employees. Respondent posts sign up lists for truck driver positions in the first two weeks of January and July. A significant number of selectors and forklift drivers (15-20) sign up each time. The driver positions are awarded by seniority.

Employee Luis Pachecho testified that in August 1999, he heard Tice telling employees in the cafeteria during a break that:

> If the Union were to come in, that they would not be able to go to the driver positions and that if the Union were to come in, that seniority would not exist anymore. He was talking about the drivers not being able

> to vote in the election and that because the drivers were not part of the bargaining unit, that employees would not be able to go into those positions afterwards if the Union were to come in. Tice said seniority would go right out the window.

Garcia testified he heard Tice talking with Wendell Braye, McCoy, Steven Williams and three selectors while they were standing around the HD line around the dog food section. Garcia testified the heard Tice say,

> . . . do you want to work in the warehouse the whole of your life? So the only way to get off of that warehouse is to become a truck driver. And if your guys go union, you guys not going to get the truck because truck drivers are not going to be in the Union."

Tice testified that he did not recall this discussion in the cafeteria but he did remember telling employees that truck drivers would not be in the bargaining unit, after the decision regarding who would be in the unit. General Counsel contends that Pacheco and Garcia were credible witnesses and that their testimony withstood lengthy cross-examination and should be credited over Tice's testimony that he did not recall that any employees asked him questions.

Respondent notes that General Counsel offered the testimony of Garcia, McCoy and Paecheo in support of this allegation. Respondent notes that there appears to have been two separate conversations involving this allegation. In the first alleged conversation Garcia and McCoy were involved. Garcia testified that in July or August 1999, Tice who was with Wendell Braye, told him McCoy, Steven Williams and three selectors, that the only way to get out of the warehouse was to be a driver and that if there

were a union, employees would not become drivers as drivers are not in the bargaining unit. McCoy, however, testified that Tice said that the Company would hire other trucking companies to supplement the current trucks to keep the associates in the warehouse. Respondent contends that not only do Garcia's and McCoy's testimony on the same alleged conversation differ but McCoy did not testify that Tice made any threat related to the Union as he did not say Respondent would outsource the drivers' duties if the Union was elected.

Respondent notes that the second conversation allegedly occurred between Tice and unidentified associates in the cafeteria. Pacheco testified that he overheard Tice tell associates in the cafeteria that if the Union came in there would be no more seniority in reference to the driver positions. Respondent contends that the testimony of Garcia, McCoy and Pacheco was either not credible or wholly insufficient to support a violation, and that conversely, Tice's testimony was clear, credible and consistent as he denied each one of the alleged conversations. Respondent contends that the only conversation that could have related to these allegations is that Tice told the employees that drivers were not in the bargaining unit. Respondent also contends that in training Tice had received, he was instructed not to threaten employees.

I find that Tice did threaten the employees as set out above that they would lose the opportunity to become truck drivers if the employees selected the Union as their collective bargaining representative. It does appear as noted by Respondent that there were two separate conversations involved here, one involving both Garcia and McCoy

and the second overheard by Pacheco. Contrary to the Respondent's contentions I find that the testimony of McCoy and Garcia was credible although I note that McCoy testified that Tice had told the employees that the Respondent would hire another trucking company to make the deliveries as the unit employees would no longer have an opportunity to become truck drivers. I credit McCoy in this regard although Garcia did not testify to this statement. I do not agree with Respondent's contention that McCoy did not attribute the outsourcing of the drivers' duties to the Union's election. Rather I find that this was implicit in McCoy's testimony. I also credit Pacheco's testimony as set out above. I note that Tice did not clearly deny that these conversations occurred but rather testified he did not recall them. I also note that Respondent did not call supervisor Wendell Braye or Steven Williams to testify concerning the conversation who would have been favorably disposed to Respondent's position to corroborate Tice's version of the conversation. While I note that truck drivers were not to be included in the bargaining unit, this did not automatically or inevitably preclude employees who were in the bargaining unit from being given an opportunity to become truck drivers. I conclude that Tice did threaten employees in two separate conversations as set out above that if the Union were selected, they would lose the opportunity to become truck drivers. Respondent violated Section 8(a)(1) of the Act by the issuance of these threats by Tice. Prediction of effects of unionization must be based on objective fact and were clearly not based on objective facts in this case *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969); *Debber Electric*, 313 NLRB 1094, 1097 (1994).

4. Paragraph 5(d) of the Consolidated Complaint, as amended at trial, alleges that on/or about October 27, 2000, Respondent by Jack

Mosko, threatened to discharge employees because they engaged in concerted protected activities by trying to assist fellow employees to address work-related issues with Respondent.

Current employee Joaquin Garcia and former employee Tarvis Hooks testified concerning this allegation. Jefferson Jules was an employee who was a Seventh Day Adventist and was having problems with getting 40 hours of work per week because he came in late on Saturday and Sunday. He discussed his problem with Garcia and Hooks. On October 27, 2000, before they punched in for work Jules discussed his problem with Hooks who advised him to talk to Distribution Manager Jack Mosko but to take a witness because management could twist his words and that dishonesty automatically terminates employees. Jules said he wanted to take Garcia and Hooks with him. Jules wanted to be able to work another day to resolve his problem. Jules, Hooks and Garcia decided to wait until after the warm-up meeting conducted by supervisor Jose Diaz. Warm ups consist of two to five minutes of stretching and exercise at the start of the shift in preparation for the work which involved physical exertion. During the warm up periods the supervisor discusses with the employees anything necessary to apprise them of concerning the shift or upcoming problems or information to be passed on to the employees. During the warm-up meeting supervisor Jose Diaz announced a new procedure for working overtime. It provided that employees who wanted to work overtime must request it a day in advance and would only be permitted to work one day of overtime per week. After the warm-up Hooks asked Diaz if Jules, Garcia and he could go see Mosko. Garcia saw Hooks and Jules talking to Diaz. He joined them and said he would go with them. Diaz said go ahead. When they arrived at Mosko's office they asked to see Mosko. Warehouse superintendent Joe Cox was also there. They sat down and Mosko asked

Jules to go first. Jules said he had a complaint and began to talk about his problem. Mosko interrupted and asked Hooks and Garcia why they were there. Garcia said, "I came here because Jefferson Jules and Tarvis Hooks told me that we need to see you about . . . Jefferson's problems. Hooks said he was there as Jules' witness. Mosko said he did not need them and sent them back to work while Jules remained to discuss his problem alone.

About 30 minutes later, Hooks and Garcia were called back into Moskos' office. Mosko, Cox and Diaz were present. Mosko asked why they had come to his office with Jules. Garcia said he came to discuss Jules' problem. Hooks said he came to be a witness. Mosko said they had told Diaz they were going to talk about overtime and that this was a very serious problem because they had been dishonest and that normally Respondent terminated employees for dishonesty. Garcia testified that Mosko said you could be fired or given a management statement which is a note to file of some type of unacceptable conduct. Hook testified that normally we terminate you for dishonesty but in this case your supervisor will get with you and give you some counseling statements. Garcia and Hooks attempted to explain that they had not given Diaz a reason for their request to talk to Mosko and that Diaz had assumed the request was made to discuss the new overtime policy which he had been advising the employees of at the warm-up meeting. Diaz contended that Hooks had asked about overtime and that James Roger another supervisor was there. Garcia and Hooks contended that Roger was not there. Mosko told them to return to work and that their supervisor Michael Collins would get with them later about the decision on the manager's statement.

General Counsel contends that Mosko's version was consistent with Hooks and Garcia up to a point. Mosko testified he said, "Well guys, with the facts I have, the only conclusion I can make is that you guys are playing a game and you are being dishonest . . . there's been a few people in the past, based upon the severity of the breaking of the rule that have been terminated . . . but to memorialize what just occur here, I said Jose, who's their immediate supervisor, will issue them a level of counseling . . . ." However, Mosko also testified that at the end of the meeting there would be no counseling because there had been a misunderstanding. Jace Diaz was not called as a witness and Cox did not testify about the meeting. Garcia testified that about an hour after this meeting, Cox came to him and told him that he believed Garcia was telling the truth and had told Mosko this. Hooks testified that Cox never apologized.

Respondent relies on the testimony of Mosko that he questioned Hooks and Garcia as to why they were in his office to discuss Jules' problem and that they contended they wanted to be witnesses and that he then told them to go back to work as this was not an investigatory interview. After discussing Jules' problem, Mosko then questioned Diaze who said that Garcia and Hooks told him they wanted to see Mosko about the overtime policy he had just discussed with the employees. Mosko testified he then called Garcia and Hooks back to his office because he thought they had lied to Diaz about the reason they had asked to speak to Diaz. When he told them Diaz had told him they had asked to see him about the new overtime policy, Garcia and Hooks did not respond. He then believed that Hooks and Garcia had lied to Diaz as by their own

admission they wanted to act as witnesses for Jules. He then informed them they "could" receive counseling for dishonesty. Only at that point did Garcia and Hooks tell him they had given Diaz a reason for their request to see Mosko. When Mosko questioned Diaz, he admitted it was possible that he had assumed that Garcia and Hooks had wanted to see Mosko about the overtime policy. Mosko testified he told Garcia and Hooks there was a misunderstanding and that there would not be any discipline and neither of them did receive any discipline.

I find that Respondent violated Section 8(a)(1) of the Act by the threat of discipline issued to Garcia and Hooks by Mosko. To the extent that the versions of this incident differ I credit that of Garcia and Hooks. I note that neither Diaz who did not testify nor Cox who testified were questioned about what occurred at these meetings. Clearly Garcia and Hooks were engaged in protected concerted activities when they attempted to accompany Jules to discuss his work schedule problem. When Masko ascertained that the problem was one of Jules' work schedule and since this was not an investigatory review, he sent Garcia and Jules back to work in accord with *Epilepsy Foundation*, *supra*. However, the record is clear even under his version that Mosko did threaten Garcia and Hooks with discipline including discharge while they were attempting to help their fellow employee, Jules. It appears that Masko was so concerned about their engagement in protected concerted activities that he rushed to judgment in this case and responded with a threat of discharge which was clearly an overreaction to their mere request to meet with him.

5. Paragraph 5(b)[3] of the Consolidated Complaint alleges that on/or about March 15, 2001, Mosko threatened employees with discharge because they engaged in union activities and harassed employees by requesting that employees report to Respondent, the union activities of other employees.

This allegation invokes an alleged threat of discharge by Mosko to Luis Pacheco for home calling and alleged harassment of employees by Mosko by his request that employees report to Respondent the union activities of other employees.

In late 2000 and early 2001, employees were actively campaigning in support of the Union for the upcoming election scheduled for . They passed out Union fliers, obtained signed authorization cards, wore Union T-shirts that said, "Vote yes for the Union" and began home calling on their fellow employees on behalf of the Union in February 2001. Hooks testified that Respondent posted two memos to employees in the warehouse in opposition to the home calling. The first memo to employees stated that the pro-union employees were harassing employees at their homes. It was only up for a day or two and was removed before Hooks was able to copy it. The second memo, dated February 2, 2001, specifically mentioned Steve Marrs and Hooks and stated that they were harassing employees. Pacheco testified that during this period he made the home calls almost every day he worked and made about 25 home calls each week.

Pacheco was called to Joe Cox' s office in March 2001. Cox said Mosko wanted to see him. When he arrived at Mosko's office Cox walked in with employee Henry

3 Paragraph 5(b) was withdrawn by General Counsel.

Ferguson and motioned for him to speak. Ferguson told Pacheco he did not want him to bring the Union people to his house anymore. Pacheco told Ferguson they had discussed this on the floor and asked why Ferguson was bringing it up in front of management. Ferguson continued and became agitated and threatened Pacheco that he would turn the dogs on Steve Marrs and Pacheco if they came by his house again. Mosko stated that they were all adults and could settle this in a civilized manner. Pacheco told Ferguson that if he had told him this on the prior visit, they would not have come by his house a second time.

Mosko then pulled out a folder and told Pacheco if anyone does anything to misrepresent Publix outside the workplace, those are ground for termination. He then told Pacheco a story that he had fired two employees for something they did outside of work. He then read a statement from the Company's rules that if anyone "harasses someone, those are grounds for termination." Pacheco testified that Mosko told him "that it applies to the Union as well and I'm sure you're aware of this Luis, that it applies to you guys as well." Pacheco testified that Mosko did not make a similar comment to Feerguson. Pacheco testified that Mosko also said if anybody harasses others or there are any problems either sides should come to him. In reference to a question by Ferguson as to how long the Union could campaign, Mosko told him there was no time limit. He also said that the Union was attempting to chop Publix off at the knees and that all of the lawsuits against the Company were caused by the Union trying to harm the Company. Mosko also said that anyone who supported something like that should be ashamed of himself.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act by its restriction of postings by the Union on the Union bulletin board on Respondent's premises.

ORDER[4]

Dated at Washington D. C.

Lawrence W. Cullen
Administrative Law Judge

4 If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.